not write English, the Trial Court specifically warned Counsel "I do not want to get into any discussion of the subject at this time", thus foreclosing any objections, although the attorney for the petitioner then stated: "You know the question is raised whether the juror can read".

It is respectfully submitted, that in enacting Section 1865, Title 28, U.S.C. it was the intention of Congress to eliminate from jury service, jurors that were illiterate, and therefore incompetent. The report of the Committee, (H.R. Report No. 1076, 90th Congress - 2nd Session - Congressional and Administrative News - pages 1759, 1796), states as follows:

> "The initial line of defense against incompetence is the requirement that voter lists be used as the primary source of potential jurors. Voter lists contain an important built in screening element in that they eliminate those individuals who are either unqualified to vote or sufficiently interested in the world about them to do so. But above and beyond that manifistation of interest in the affairs of citizenship stand the objective qualifications required by S 989 as amended. A juror must be able to read, write and understand the English language with a degree of proficiency sufficient to understand and fill out a juror qualifi-

cation form * * *. The foregoing screens will eliminate virtually all those who ought not to be allowed to sit on a jury, the illiterate * * * .

At page 1797 the Committee further stated:

"Accordingly your committee is convinced that S 989 as amended contains features that will eliminate virtually every candidate unsuited for service."

It is respectfully submitted that as far as can be determined there is no case in point, decided by either this Court, or by any of the Circuit Courts of Appeal, directly in point, as to whether a juror who cannot read and write English is incompetent.

In the cases cited below, United States v Rosenstein, 34 F. 2d 630 (2nd Cir., 1929), Jackson v United States, 408 F. 2d 306, 309, and Ford v United States 201 F. 2d 300, 301 (5th Cir., 1953) do not at all treat this question.

In United States v Rosenstein - 34 F. 2d 630, one of the jurors was disqualified for service due to the reason that he resided in Queens County, outside the jurisidiction of the Southern District of New York. Objection to this juror was

not made on the voir dire, but when the testimony was well progressed into the Government's case, a motion was made to withdraw a juror on the ground that one of the jurors was not a resident of the district. The Circuit Court in rejecting this contention said; at page 634: Quoting from People v Cosmo, 205 N.Y. 91;

> "If defeated parties were in all cases to be permitted to move for new trials on such grounds as that a juror has passed the age of 70 when he sits in a case, or has disposed of his property, or that he is lacking in any other of the several technical qualifications, which do not affect his intelligence, and fairness no judgment would ever be safe from attack, and no trial could ever be confirmed to anything like well-defined or limited issues".

The Court then concluded:

> "It is different from the situation where a juror is not fair or impartial, or is mentally not qualified to fulfill that office."

In Jackson v United States, 408 F. 2d 306, (9th Cir., 1969), a juror made no response to a question by the trial judge as to whether any member of the

panel was acquainted with the defendant. At that time the juror did not recognize the name of the defendant personally, and recognized the defendant only to the extent that the defendant was a person that the "juror may or may not have seen at one time or another".

During the course of the trial, the juror came to feel that he may have met the defendant previously probably in connection with the juror's work at the bank. However, the juror did not then advise either the judge or the attorneys of his belated recognition. As it turned out, the juror had opened an account for the defendant in a bank, two years and five months prior to the trial. The Court in affirming the judgment said at 408 F 2d 309:

> "A defendant is entitled to be tried by an unprejudiced and legally qualified jury. United States v Napolene 349 F. 2d 350-353."

> "Nevertheless, where it is discovered after a trial, that an answer given by a prospective juror, was incorrect because of an oversight or failure to understand the question, and no reasonable possibility of prejudice is shown the question of whether a new trial should be granted rests within the sound discretion of the district court. See United States

v Woods, 3 Cir. 364 F. 2d 481, 483; United States v Eury, 2nd Cir. 268 F. 2d 517, 521-522."

In Ford v United States 201 F. 2d 300, the juror had previously been convicted of a felony. The Court said at page 301:

> "While the previous conviction of a felony does not render the convicted person fundamentally incompetent to sit on a jury, it is a ground of challenge for cause, which the defendant may insist upon or waive if he elects. If not seasonably exercised the objections is waived. . . "
>
> "Where the objection to a juror relates not to actual prejudice or other fundamental incompetence, but to a statutory disqualification only such disqualification is ordinarily waived by failure to assert it until after verdict, even though the facts which constitute the disqualification were not previously known to the defendants. The objection based upon previous felony conviction, comes too late after verdice, no actual bias or prejudice being shown."

In the cases cited by the Court below, the competency of the juror was not in issue. The fact that a juror lived out of the district (United States v Rosenstein, 34 F. 2d 630), or that a prospective juror had a casual acquaintence with the defendant

(Jackson v United 408 F. 306), or that a juror had previously been convicted of a felony (Ford v United States 201 F. 2d 300), does not in any affect the competency of the juror to serve.

The juror in the case at bar, conceededly was illiterate. That term is defined as "ignorant""uneducated" (Webster's New Twentieth Century Dictionary). It is respectfully submitted that the illiteracy of the juror is fundamental incompetence.

It is respectfully submitted that the Court below was in error, in denying the motion to set aside the verdict "solely on the ground that in the opinion of the trial Court the juror understood the English language".

The Court gave the statute(28 U.S.C. 1865) a meaning without the slightest indication that Congress contemplated such meaning. (Jackson v United States 390 U.S. 570, 578). It is, of course, elementary that a defendant is entitled to be tried by an unprejudiced and legally qualified jury. (Jackson v United States 408 F. 2d 306, 308; United States v Napolene 349 F. 350, 353).

The Court below deprived your petitioner of a trial by 12 competent jurors as contemplated by Rule 23(b) of the Federal Rules of Criminal Procedure, and de-

prived your petitioner of his constitutional rights to a trial by a jury. (Article III, Section 2, Clause 3, United States Constitution; Sixth amendment, Constitution of the United States.)

Trial by jury has been defined by this Court in Patton v United States 281 U.S. 276, 288:

> (1) that the jury should consist of twelve men, neither more or less, and that the verdict must be unanimous (Andres v United States 333 U.S. 740, 748.)

It is interesting to note that this Court has granted certiorari in cases where the state constitution permits a criminal conviction by less than an unanimous vote of twelve jurors. (Apodaca, v Oregon, 400 U.S. 390, and Johnson v Louisiana, 400 U.S. 391, and tha arguments are to be heard at this term.

In the case at bar, there was no consent to a trial by less than 12, as was the case in Patton v United States 281 U.S. 276, and the remark of the Court below, than "at that late date, for thejudge to take measures to make certain that Mrs. Altman understood all the evidence such as having read to her any exhibits claimed by defendant to be of critical importance, is answered by the fact, that the trial Court did not want to get into any

discussion of the subject at that time. At no time during the trial, did the Court suggest a trial by less than 12. Thus, the decision of the Circuit Court that the judge could have persuaded the parties to accept a verdict of eleven jurors is merely conjectural and has no basis in the record.

In Rabinowitz v United States 366 F. 2d 34, (5th Cir. 1966), decided en banc, the Court held that the qualifications set forth in the statute are uniform, not maximum or minimum, and do not allow for the exercise of any discretion by Court officials, and therefore any jury is fatally defective if one or more of the members is subject to statutory disqualifications"

It is respectfully submitted that a jury list is fatally defective if court officials have not followed the federal statutory scheme by taking steps to exclude disqualified persons, even the trial Court was amazed.

In United States v Golden, 235 F. Supp 1020, Chief Judge Sweeney, United States District Court, District of Mass. said:

> "A person who is incompetent to serve cannot serve".

The disqualification of one juror, provided your petitioner with an eleven man jury panel in violation of his con-

stitutional rights to a jury of twelve. (Glasser v United States 315 U.S. 60, 85; Jackson v United States 408 F. 2d 306; United States v Napolene, 349 F. 2d 350, 353).

It is respectfully submitted that this Court should grant certiorari to resolve the question of whether a juror who could not read, write and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form, was nevertheless qualified to act as a juror, especially when the trial court would not permit any discussion at that time, when it was first discovered that the juror could not read English, and the petitioner was prevented by the trial Court from raising any objections. It is respectfully submitted that the petitioner's constitutional rights were violated.

II

CERTIORARI SHOULD BE GRANTED TO REVIEW THE HOLDING OF THE COURT BELOW THAT PETITIONER LACKS STANDING UNDER THE FOURTH AMENDMENT TO OBJECT TO THE SEIZURES OF PAPERS FILED WITH THE JUDICIAL CONFERENCE OF THE STATE OF NEW YORK, AND THE APPELLATE DIVISION OF THE SUPREME COURT:

Petitioner maintains a law office in the County and State of New York, from which he carried on a law practice, consisting of personal injury claims and actions. These cases were handled on a contigent fee basis and he was required to file retainer statements and closing statements setting forth inter alia, the gross amount of the recovery, the person by whom it was paid, the amount paid to the client, expenses and disbursements charged against the client's share of the recovery, and the amount retained by the attorney as his fee.

Failure to file such statements constitutes professional misconduct and/or disbarment (McKinney's New York Court Rules, Sec. 603.2, New York Judiciary Law, Section 90(2).

Part 4, Rule IV of the Special Rules of the Appellate Division of the Supreme Court, First Judicial Department, (McKinney's New York Court Rules, Section 603.4), provides as follows:

(a) All statements of retainer or closing statements shall be deemed confidential and the information therein contained shall not be divulged or made available for inspection or examination except upon written order of the Presiding Justice of the Appellate Division."

On March 14, 1961, pursuant to a request from the Internal Revenue Service, the Presiding Justice of the Appellate Division for the First Department entered an order permitting the Internal Revenue Service to examine retainer and closing statements.

On January 6 and September 26, 1966, a Special Agent of the Internal Revenue Service was permitted to inspect the retainer and closing statements filed by your petitioner. The indictment and proof on the trial was predicated upon your petitioner's alleged failure to declare income received from his practice as ascertained from the "confidential" closing statements filed by your petitioner. Your petitioner moved before trial to suppress the statements and all evidence derived from them; said motion was denied by then District Court Judge Mansfield (United States v Silverman, 311 F. Supp. 485 (S.D.N.Y., 1970).

The Court below held that petitioner lacks standing under the fourth amendment

to object to the seizure of papers filed with and in possession of the Appellate Division and the Judicial Conference.

It is respectfully submitted that the defendant has standing to complain that the statements were improperly secured by the Internal Revenue Service. (Rule 41(e) Federal Rules of Criminal Procedure).

Prior to the decision of this Court in United States v Jones, 326 U.S. 257, the concept of a person aggrieved was strictly limited by the ancient laws of property. It was required that the individual raising the question of unreasonable search and seizure claim ownership in the property searched. (See Gaskins v United States, 95 U.S. App. D.C. 34; 218 F. 2d 47; Gibson v U.S., 169 F. 2d 381; In Re Nassetta, 125 F. 2d 924; Jones v United States, 262 F. 2d 234; Connonly v Medalie 58 F. 2d 629 (2nd Cir.); Jeffers v United States, 187 F. 2d 489, aff'd 342 U.S. 48.

In Jones, supra, the defendant was arrested in an apartment where he was an invitee. Narcotics were found outside the window of the apartment. Jones moved to suppress on the ground that a warrant had been issued without probable cause. The government claimed that Jones had no standing since he alleged neither ownership in the property seized or an interest in the apartment greater than an invitee or guest.

This Court in holding that Jones had standing, said (Jones v United States, 362 U.S. at page 266):

> "We are persuaded however, that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions developed and refined by the common law of evoking the body of private property law which more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical."

In Harlow v United States, 301 F. 2d 361, (1962), at page 372, not 14, the Court commented:

> "We think it clear that appellant Harlow as author of the letters which were seized had a sufficient interest in those letters to enable him to attack the alleged legality of their seizure. (Henzel v U.S. 296 F. 2d 650).

The cases cited by the Court below, namely, Alderman v United States, 394 U.S. 165; Donaldson v United States, 400 U.S. 517; First Nat'l Bank of Mobile v United States, 267 U.S. 576; aff'd 295 F. 142; Wong Sun v United States, 371 U.S. 471, United States v Biegel, 370 F.2d 751; cert. denied 360 U.S. 912, are not dispositive of this issue.

In Alderman v United States, 394 U.S. 165, the petitioners demand retrial if any of the evidence used to convict him was the product of unauthorized surveillance, regardless of whose Fourth Amendment right the surveillance violated. This Court there said, at page 171, 172:

> "This expansive reading of the Fourth Amendment and of the exclusionary rule fashioned to enforce it is admittedly inconsistent with prior cases and we reject it. The established principle is that suppression of the product of a Fourt Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. Co-conspirators and co-defendants have been accorded no special standing".

At bar, it is respectfully submitted the petitioner himself was the victim of the invasion of privacy.

In Donaldson v United States, 400 U.S. 517, the taxpayer was once employed by Acme Operating Company Inc., as a circus performer. An Internal Revenue Agent served seperate summonses to Acme and to its accountant to produce certain records of Acme having to do with the taxpayer. This Court permitted such inspection, and said, at page 522, 523:

> "We emphasize initially as did Judge Tuttle in the opinion for the Court of Appeals, 418 F. 2d at 1214 that what is sought here by the Internal

Revenue Service from Merourio and from Acme is the production of their records and not the records of the taxpayer. Further, as Judge Tutle also emphasized, this is not a case where a summons has been issued to the taxpayer itself seeking access to his books and information from his mouth. Neither is it a case where the summons is directed at the taxpayer's records in the hands of his attorney or his accountant with the attendent question of privilege, or even in the hands of anyone with whom the taxpayer has a confidential relationship of any kind."

It is respectfully submitted that at bar, your petitioner had prepared and filed these records with the understanding that these statements "shall be deemed confidential", which of course, distinguishes this case from Donaldson, supra.

The facts in First National Bank of Mobile v United States, 267 U.S. 576, aff'd 295 F. 2d 142 (S.D. Ala., 1924), and Foster v United States, 265 F. 2d 183, cert. denied, 360 U.S. 912, are similiar. In both of these cases served summonses on banks to produce their records relating to the account of the taxpayer. The records were those of the bank, and not that of the taxpayer. Examination of the records were permitted.

In United States v Biegel, 370 F. 2d 751, 756, the Court in holding that appellant had no standing, said:

"In any event, appellants Lapi and Verzino have no standing to obtain suppression of the evidence seized from Beigel. "In order to qualify as a person aggrieved by an unlawful search and seizure (Fed. Rule Crim. P. 41(e), one must have been a victim of a search and seizure, one against whom the search was directed as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search and seizure directed at someone else. Jones v United States, 362 U.S. 257, 261; Wong Sun v United States, 371 U.S. 471. Since neither Lapi nor Verzino was "on the premises" where the search occurred and their convictions did not flow from the possession of either of them of the drugs at the time of the search they cannot challange the legality of the search. Diaz-Rosendo v United States 2nd Cir., 1966. Moreover, having failed to make any objection below, they may not raise the issue for the first time on appeal. United States v Herskovitz, 209 F. 2d 881 (2nd Cir., 1954).

In Wong Sun v United States, 371 U.S. 471, at page 484, this Court said:

"The exclusionary prohibitation extends as well to the indirect as to the direct products of such invasion."

It is respectfully submitted that this Court should grant certiorari to review the holding of the Court below that

petitioner lacks standing under the Fourth Amendment to object to seizure of papers filed with the Judicial Conference of the State of New York, and the Appellate Division of the Supreme Court, when the filing was pursuant to the Rules of the Appellate Division of the Supreme Court of the State of New York, and when such filing is deemed confidential.

III

CERTIORARI SHOULD BE GRANTED TO REVIEW THE HOLDING OF THE COURT BELOW THAT PETITIONER'S RIGHTS UNDER THE FIFTH AMENDMENT WERE NOT VIOLATED BY THE INTORDUCTION INTO EVIDENCE OF THE CLOSING STATEMENTS FILED BY THE PETITIONER WITH THE JUDICIAL CONFERENCE:

Shapiro v United States 335 U.S. 1, has been frequently cited for the proposition that private papers may be introduced in evidence, that the production of same does not violate the constitutional rights of the parties. Shapiro, supra, has been cited by the Court below, to sustain its contention that "Records required to be kept pursuant to a reasonable regulatory scheme have 'public aspects' and may be examined for evidence of criminal conduct".

Shapiro, supra, is not applicable in the case at bar, if it is still the law, which is doubtful, in view of subsequent decisions of this Court. (see, Spevak v Klein, 385 U.S. 511; Marchetti v United States, 390 U.S. 39; Gross v United States, 390 U.S. 62.

In Shapiro v United States, 335 U.S. 1, the facts were as follows: The defendant, a wholesale dealer in fruits and produce had been served with a departmental subpoena by the Office and Price Administration directing him to produce sales, invoices, sales books, ledgers, inventory records, etc.. At the hearing the presiding officer stated that the defendant was entitled to whatever immunity flows as a matter of law from the production of such records. Said this Court, by a 5-4 vote as follows:

> "the privilege which exists as to to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subject of governmental regulations and the enforcement of restrictions validly established."

In Spevak v.Klein, 385 U.S. 511, an attorney was desbarred for failure to produce his financial records pursuant to Rule 5 of the Special Rules of the Appellate Division, Second Department (subsequently re-numbered Rule IV(6)). This rule required an attorney to keep all pleadings, records and other papers pertaining to an action, claim and proceeding and all data and memoranda and disposition thereof. Spavak was disbarred by the Appellate Division which was affirmed by the New York Court of Appeals (16 N.Y. 2nd 1048). This Court in reversing the order of disbarment, said at page 512:

> The self-incrimination clause of the Fifth Amendment which has been absorbed in the Fourteenth, extends

its protection to lawyers and should not be watered down by imposing the dishonor of disbarment and the deprivation of livelihood as a penalty of asserting it."

and at page 516, this Court said:

"As we recently stated in Miranda v Arizone 384 U.S. 436, "In this Court, the privilege has consistently been accorded a liberal construction" It is in that tradition that we overrule Cohen v Hurley, 366 U.S.117 . We find no room in the privilege against self incrimination for classification of people ao as to deny it to some and extend it to others. Lawyers are not excepted from the words, 'No person * * * shall be compelled in any criminal case to be a witness against himself' and can imply no exception. Like the school teacher in Slochower v Board of Education, 350 U.S. 551: and the policeman in Garrity v New Jersey, 385 U.S. 493, lawyers also enjoy first class citizenship."

In discussing the Shapiro case, supra, this Court said at page 517:

"The Shapiro case dealt with a federal price control regulation requiring merchants to keep sales records. The Court called them records with "public aspects" as distinguished from private papers. (335 U.S. at 34) and concluded by a divided vote that their production did not violate the Fifth Amendment. We are asked to overrule Shapiro. But we find it unnecessary to reach it."

In Marchetti v United States, 390 U.S. 39, Marchetti was convicted in the District Court on a charge of violating the federal wagering tax statutes (26 U.S.C. Section 4411, 4412), this Court in reversing the conviction said at page 52:

> "Substantial hazards of incrimination as to past or present acts plainly stem from the requirements to register and pay the occupational tax.** In the first place, satisfaction of those requirements increases the likelihood that any past or present gambling offenses will be discovered and successfully prosecuted."

This Court in distinguishing Shapiro supra, said at page 57:

> "There is no need to explore further the elements and limitation of Shapiro and the involving public papers, those points of difference in combination preclude any appropriate application of that case to the present one."

To the same effect, see Gross v United States, 390 U.S. 62, decided at the same time as Marchetti, supra.

In Gardner v Broderick, 392 U.S. 273, Gardner was discharged as a patrolman pursuant to section 1123 of the New York City Charter, for his refusal to sign a waiver of immunity before a Grand Jury. This Court in upholding Gardner, said at page 276:

"Our decisions establish beyond dispute the breath of the privilege to refuse to respond to questions when the result may be self-incrimination and the ned fully to implement its guaranty. See Spivak v Lkein, 385 U.S. 511 (1967), Conselman v Hitchcock 142 U.S. 547, 585-586 (1892), Albertson v Sachs, 382 U.S. 70, 80 (1965). The privilege is applicable to state as well as federal proceedings * * * The question presented in the present case is whether a policeman who refuses to waive the protections which the privilege give may be dismissed from office because of that refusal."

This Court in upholding Gardner, quoted Garrity v New Jersey, 385 U.S. 493 (1967), as follows:

"We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings obtained under threat of removal from office, and it extends to all, whether they are policemen or other members of our body politic."

The other cases cited in the Court below are, inapplicable. (Wilson v United States, 221 U.S. 361; Stillman v United States, 177 Fed. 2d 607; and shushan v United States, 117 F. 2nd 110, cert. den. 313 U.S. 574.

In Wilson v United States, 221 U.S. 361, the plaintiff in error, was held in contempt for refusal to permit the inspection by a grand jury of a letter press copy

book in his possession. The books belonged to a corporation of which he was president and were required to be produced by a subpoena duces tecum. This Court in upholding the subpoena, said at page 380:

> "But the physical custody of incriminating documents does not of itself protect the custodian against their compulsory production. The question still remains with respect to the nature of the documents and the capacity in which they are held."

This, in Wilson, supra, the books were not the property of Wilson, but were the property of the corporation, and Wilson was compelled to produce these records.

In Stillman v United States,, 177 F. 2d 697, income tax returns were admitted into evidence, where according to statute and regulations, such returns could be used in any case in which the United States was interested..

In Shushan v United States, 117 F 2d 110, 117, the Court held that the statute requiring a return for taxation of all income, unlawful and lawful is constitutional and that the defendant may at the proper time and on the specific ground assert the right to withhold the particular evidence.

Thus, by reason and authority, the statements of retainers and closing state-

ments are entitled to the protection of the Fifth Amendment, against self-incrimination, as those papers are not "public" as in Shapiro v United States, 335 U.S.1, but are the same type of records as in Spevak v Klein, 385 U.S. 511. These statements when filed with the Judicial Conference are "secret" and "confidential", private and not public.

It is respectfully submitted that this Court should grant certiorair to review the holding of the Court below that petitioner's rights were not violated by introduction into evidence of the closing statements filed by the petitioner with the Judicial Conference of the State of New York.

IV

CERTIORARI SHOULD BE GRANTED TO REVIEW THE HOLDING OF THE COURT BELOW THAT THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN PERMITTING THE JURY IN ITS DELIBERATIONS TO EXAMINE THE SUMMARY SCHEDULES PREPARED BY NUNZIO DONATO, INTERNAL REVENUE AGENT WITHOUT FIRST INSTRUCTING THE JURY THAT THE SUMMARIES WERE NOT PROOF OF ANY FACTS, AND PETITIONER WAS NOT ACCORDED DUE PROCESS:

The Government introduced into evidence the testimony of Nunzion Donato, a

field group supervisor of the Internal Revenue Service, who testified that he had heard most of the testimony in this case, and that he had examined all the documents and exhibits which were in evidence, and that as a result he prepared certain schedules, in his own handwriting.

The verdict of the jury, was the result of the jury comparing petitioner's tax returns and the summary schedules prepared by Numzio Donato, the Government Revenue Agent, and not upon the primary evidence.

It is respectfully submitted that when the Trial Court permitted these exhibits to be examined by the jury in its deliberations, the Court erred in not cautioning the jury that these summaries had no independent value, and that they could chose to disregard it as evidence, if they did not accept the correctness of any document, upon which those summaries were prepared; and they they must likewise disregardso much of the summary as was based upon the testimony of such witnesses and such documents as the jury decided to disregard.

At the time of the jury's deliberations, and when the jury requested these exhibits, the Court merely said:

I take it that refers to the schedules I told you you could consider as a

memorandum but which are not basic evidence, the basic evidence being the documents which are in evidence. But, I will sent in these exhibits to you."

It is respectfully submitted that in permitting these summary sheets to be examined by the jury at the time of its deliberations, the Court should have followed the guide lines for the introduction of such evidence as set forth in United States v Bernard, 287 F. 2d 715, and should have instructed the jury that these exhibits were entitled to weight as evidence only to such an extent as the jury could find that the primary testimony of other witnesses and the exhibits upon which those summaries were based were entitled to weight and credibility, and that if they did not accept the correctness of any document, then they must likewise disregard so much of the summary as is based upon such witnesses and documents.

In United States v Barnard, 287 F. 2d 715, page 722, the Court in discussing the admissibility of summaries made by an agent of the Internal Revenue said:

"With respect to the testimony of Ruggabar (Internal Revenue Agent), the Court instructed the jury that his testimony was entitled to weight as evidence only to such an extent as the jury could find that the pri-

mary testimony of other witnesses and the exhibits upon which his expert testimony was based was entitled to weight and credibility. With respect to the Ruggabar summaries, the Court stated in its charge to the jury;"

"Such exhibit has no independent value. If you choose to disregard as evidence all or a part of the testimony of any witness in this case or do not accept the correctness of any document admitted into evidence than you must likewise disregard so much of the summary as is based upon the testimony of such witnesses and such documents you decide to disregard."

Those instructions meet all the requirements for the use of such evidence as set forth in the cases.

Comparing the charge to the jury in Bernard, supra, and the comment of the Court when these charts were handed to the jury for its deliberation, where the Court characterized the testimony of Mr. Donato as "evidence", the prejudice to the defendant becomes apparent.

To the same effect, see:

United States v Johnson, 319 U.S. 503

Somberg v United States, 71 F. 2d 637 (7th Cir.)

Smith v United States, 239 F. 2d 168, cert. denied, 353 U.S. 983

Corbett v United States, 238 F. 2d 557, cert. den. 352 U.S. 990

Blackwell v United States, 244 F. 2d 423, cert. den. 355 U.S. 838

United States v Tolbert, 406 F. 2d 81

The prejudice to the defendant is apparent from the statement made by Mrs. Karman, the foreman of the jury to the Court, held on March 18, 1971, when she said:

> "In addition, to the that little note I had also requested some of the material that some of the jurors wanted to go through. There was apparently some interest that they had in certain expenses or income that they wanted to look at, and they took time and reviewed those sheets."

United States v Kelley, 105 F. 2d 912, 918 (2nd Cir., 1939) cited by the Court below is not the contrary. All it holds are that these records are admissable.

It is respectfully submitted that the action of the trial Court in not following the guide lines as to the admissibility of this evidence, highly prejudiced the petitioner and prevented him from receiving a fair trial.

It is respectfully submitted that this court should grant certiorari to review the holding of the court below that the trial court did not commit reversible error in permitting the jury in its deliberations to examine the summary schedules prepared by Nunzio Donato, Internal Revenue Agent, without first instructing the jury that the summaries were not proof of any fact, and in characterizing these summaries as "evidence".

V

CERTIORARI SHOULD BE GRANTED TO REVIEW THE HOLDING OF THE COURT BELOW THAT A FATAL VARIANCE BETWEEN THE INDICTMENT AND THE BILL OF PARTICULARS DOES NOT WARRANT REVERSAL WHEN IN THE OPINION OF THE COURT BELOW PETITIONER WAS NOT PREJUDICED BY SURPRISE OR WAS HINDERED IN HIS PREPARATION FOR TRIAL:

The government conceded and the Court below found that the original bill of particulars listed as gross income for the tax years involved the same figures which the indictment listed as taxable income.

The government, as well as the Court below, asserted that the Government supplied the petitioner with details and correct schedules after having served the bill

of particulars months before the trial.

The record on appeal belies this assertion by the Government. Petitioner concedes that there was turned over to his attorney, certain schedules, which schedules are not a part of the bill of particulars. The United States Attorney told the Court, "I have a covering letter in my file". The contents of this letter was never exhibited to the attorney for the defendant.

The function of a bill of particulars was well stated in United States v Murray, 207 F. 2d 812 (2nd Cir., 1962), at page 818:

> "The function of a bill of particulars is to enable the accussed to prepare for trial and to prevent surprise and to this end the government is strictly limited to proving what it has set forth. United States v Neff, 212 F. 2d 297."

See to the same effect:

United States v Slaughter, 89 F. Supp. 205.

Bryan v United States, 175 F. 2d 223

Rabinowitz v Borish, 43 F. Supp. 413

not write English, the Trial Court specifically warned Counsel "I do not want to get into any discussion of the subject at this time", thus foreclosing any objections, although the attorney for the petitioner then stated: "You know the question is raised whether the juror can read".

It is respectfully submitted, that in enacting Section 1865, Title 28, U.S.C. it was the intention of Congress to eliminate from jury service, jurors that were illiterate, and therefore incompetent. The report of the Committee, (H.R. Report No. 1076, 90th Congress - 2nd Session - Congressional and Administrative News - pages 1759, 1796), states as follows:

> "The initial line of defense against incompetence is the requirement that voter lists be used as the primary source of potential jurors. Voter lists contain an important built in screening element in that they eliminate those individuals who are either unqualified to vote or sufficiently interested in the world about them to do so. But above and beyond that manifistation of interest in the affairs of citizenship stand the objective qualifications required by S 989 as amended. A juror must be able to read, write and understand the English language with a degree of proficiency sufficient to understand and fill out a juror qualifi-

cation form * * *. The foregoing screens will eliminate virtually all those who ought not to be allowed to sit on a jury, the illiterate * * *.

At page 1797 the Committee further stated:

"Accordingly your committee is convinced that S 989 as amended contains features that will eliminate virtually every candidate unsuited for service."

It is respectfully submitted that as far as can be determined there is no case in point, decided by either this Court, or by any of the Circuit Courts of Appeal, directly in point, as to whether a juror who cannot read and write English is incompetent.

In the cases cited below, United States v Rosenstein, 34 F. 2d 630 (2nd Cir., 1929), Jackson v United States, 408 F. 2d 306, 309, and Ford v United States 201 F. 2d 300, 301 (5th Cir., 1953) do not at all treat this question.

In United States v Rosenstein - 34 F. 2d 630, one of the jurors was disqualified for service due to the reason that he resided in Queens County, outside the jurisidiction of the Southern District of New York. Objection to this juror was

not made on the voir dire, but when the testimony was well progressed into the Government's case, a motion was made to withdraw a juror on the ground that one of the jurors was not a resident of the district. The Circuit Court in rejecting this contention said; at page 634: Quoting from People v Cosmo, 205 N.Y. 91;

> "If defeated parties were in all cases to be permitted to move for new trials on such grounds as that a juror has passed the age of 70 when he sits in a case, or has disposed of his property, or that he is lacking in any other of the several technical qualifications, which do not affect his intelligence, and fairness no judgment would ever be safe from attack, and no trial could ever be confirmed to anything like well-defined or limited issues".

The Court then concluded:

> "It is different from the situation where a juror is not fair or impartial, or is mentally not qualified to fulfill that office."

In Jackson v United States, 408 F. 2d 306, (9th Cir., 1969), a juror made no response to a question by the trial judge as to whether any member of the

panel was acquainted with the defendant. At that time the juror did not recognize the name of the defendant personally, and recognized the defendant only to the extent that the defendant was a person that the "juror may or may not have seen at one time or another".

During the course of the trial, the juror came to feel that he may have met the defendant previously probably in connection with the juror's work at the bank. However the juror did not then advise either the judge or the attorneys of his belated recognition. As it turned out, the juror had opened an account for the defendant in a bank, two years and five months prior to the trial. The Court in affirming the judgment said at 408 F 2d 309:

> "A defendant is entitled to be tried by an unprejudiced and legally qualified jury. United States v Napolene 349 F. 2d 350-353."
>
> "Nevertheless, where it is discovered after a trial, that an answer given by a prospective juror, was incorrect because of an oversight or failure to understand the question; and no reasonable possibility of prejudice is shown the question of whether a new trial should be granted rests within the sound discretion of the district court. See United States

v Woods, 3 Cir. 364 F. 2d 481, 483; United States v. Eury, 2nd Cir. 268 F.-2d 517, 521-522."

In Ford v United States 201 F. 2d 300, the juror had previously been convicted of a felony. The Court said at page 301:

> "While the previous conviction of a felony does not render the convicted person fundamentally incompetent to sit on a jury, it is a ground of challenge for cause, which the defendant may insist upon or waive if he elects. If not seasonably exercised the objections is waived. . . "
>
> "Where the objection to a juror relates not to actual prejudice or other fundamental incompetence, but to a statutory disqualification only such disqualification is ordinarily waived by failure to assert it until after verdict, even though the facts which constitute the disqualification were not previously known to the defendants. The objection based upon previous felony conviction, comes too late after verdice, no actual bias or prejudice being shown."

In the cases cited by the Court below, the competency of the juror was not in issue. The fact that a juror lived out of the district (United States v Rosenstein, 34 F. 2d 630), or that a prospective juror had a casual acquaintence with the defendant

(Jackson v United 408 F. 306), or that a juror had previously been convicted of a felony (Ford v United States 201 F. 2d 300), does not in any affect the competency of the juror to serve.

The juror in the case at bar, concededly was illiterate. That term is defined as "ignorant""uneducated" (Webster's New Twentieth Century Dictionary). It is respectfully submitted that the illiteracy of the juror is fundamental incompetence.

It is respectfully submitted that the Court below was in error, in denying the motion to set aside the verdict "solely on the ground that in the opinion of the trial Court the juror understood the English language".

The Court gave the statute (28 U.S.C. 1865) a meaning without the slightest indication that Congress contemplated such meaning. (Jackson v United States 390 U.S. 570, 578). It is, of course, elementary that a defendant is entitled to be tried by an unprejudiced and legally qualified jury. (Jackson v United States 408 F. 2d 306, 308; United States v Napolene 349 F. 350; 353).

The Court below deprived your petitioner of a trial by 12 competent jurors as contemplated by Rule 23(b) of the Federal Rules of Criminal Procedure, and de-

prived your petitioner of his constitutional rights to a trial by a jury. (Article III, Section 2, Clause 3, United States Constitution; Sixth amendment, Constitution of the United States.)

Trial by jury has been defined by this Court in Patton v United States 281 U.S. 276, 288:

> (1.) that the jury should consist of twelve men, neither more or less, and that the verdict must be unanimous (Andres v United States 333 U.S. 740, 748.)

It is interesting to note that this Court has granted certiorari in cases where the state constitution permits a criminal conviction by less than an unanimous vote of twelve jurors. (Apodaca v Oregon, 400 U.S. 390, and Johnson v Louisiana, 400 U.S. 391, and the arguments are to be heard at this term.

In the case at bar, there was no consent to a trial by less than 12, as was the case in Patton v United States 281 U.S. 276, and the remark of the Court below, than "at that late date, for the judge to take measures to make certain that Mrs. Altman understood all the evidence such as having read to her any exhibits claimed by defendant to be of critical importance, is answered by the fact, that the trial Court did not want to get into any

discussion of the subject at that time. At no time during the trial, did the Court suggest a trial by less than 12. Thus, the decision of the Circuit Court that the judge could have persuaded the parties to accept a verdict of eleven jurors is merely conjectural and has no basis in the record.

In Rabinowitz v United States 366 F. 2d 34, (5th Cir. 1966), decided en banc, the Court held that the qualifications set forth in the statute are uniform, not maximum or minimum, and do not allow for the exercise of any discretion by Court officials, and therefore any jury is fatally defective if one or more of the members is subject to statutory disqualifications"

It is respectfully submitted that a jury list is fatally defective if court officials have not followed the federal statutory scheme by taking steps to exclude disqualified persons, even the trial Court was amazed.

In United States v Golden, 235 F. Supp 1020, Chief Judge Sweeney, United States District Court, District of Mass. said:

> "A person who is incompetent to serve cannot serve".

The disqualification of one juror, provided your petitioner with an eleven man jury panel in violation of his con-

stitutional rights to a jury of twelve. (Glasser v United States 315 U.S. 60, 85; Jackson v United States 408 F. 2d 306; United States v Napolene, 349 F. 2d 350, 353).

It is respectfully submitted that this Court should grant certiorari to resolve the question of whether a juror who could not read, write and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form, was nevertheless qualified to act as a juror, especially when the trial court would not permit any discussion at that time, when it was first discovered that the juror could not read English, and the petitioner was prevented by the trial Court from raising any objections. It is respectfully submitted that the petitioner's constitutional rights were violated.

II

CERTIORARI SHOULD BE GRANTED TO REVIEW THE HOLDING OF THE COURT BELOW THAT PETITIONER LACKS STANDING UNDER THE FOURTH AMENDMENT TO OBJECT TO THE SEIZURES OF PAPERS FILED WITH THE JUDICIAL CONFERENCE OF THE STATE OF NEW YORK, AND THE APPELLATE DIVISION OF THE SUPREME COURT:

Petitioner maintains a law office in the County and State of New York, from which he carried on a law practice, consisting of personal injury claims and actions. These cases were handled on a contigent fee basis and he was required to file retainer statements and closing statements setting forth inter alia, the gross amount of the recovery, the person by whom it was paid, the amount paid to the client, expenses and disbursements charged against the client's share of the recovery, and the amount retained by the attorney as his fee.

Failure to file such statements constitutes professional misconduct and/or disbarment (McKinney's New York Court Rules, Sec. 603.2, New York Judiciary Law, Section 90(2).

Part 4, Rule IV of the Special Rules of the Appellate Division of the Supreme Court, First Judicial Department, (McKinney's New York Court Rules, Section 603.4), provides as follows:

(a) All statements of retainer or closing statements shall be deemed confidential and the information therein contained shall not be divulged or made available for inspection or examination except upon written order of the Presiding Justice of the Appellate Division."

On March 14, 1961, pursuant to a request from the Internal Revenue Service, the Presiding Justice of the Appellate Division for the First Department entered an order permitting the Internal Revenue Service to examine retainer and closing statements.

On January 6 and September 26, 1966, a Special Agent of the Internal Revenue Service was permitted to inspect the retainer and closing statements filed by your petitioner. The indictment and proof on the trial was predicated upon your petitioner's alleged failure to declare income received from his practice as ascertained from the "confidential" closing statements filed by your petitioner. Your petitioner moved before trial to suppress the statements and all evidence derived from them; said motion was denied by then District Court Judge Mansfield (United States v. Silverman, 311 F. Supp. 485 (S.D.N.Y., 1970).

The Court below held that petitioner lacks standing under the fourth amendment.

to object to the seizureof papers filed with and in possession of the Appellate Division and the Judicial Conference.

It is respectfully submitted that the defendant has standing to complain that the statements were improperly secured by the Internal Revenue Service. (Rule 41(e) Federal Rules of Criminal Procedure).

Prior to the decision of this Court in United States v Jones, 326 U.S. 257, the concept of a person aggrieved was strictly limited by the ancient laws of property. It was required that the individual raising the question of unreasonable search and seizure claim ownership in the property searched. (See Gaskins v United States, 95 U.S. App. D.C. 34; 218 F. 2d 47; Gibson v U.S., 169 F. 2d 381; In Re Nassetta, 125 F. 2d 924; Jones v United States, 262 F. 2d 234; Connonly v Medalie 58 F. 2d 629 (2nd Cir.) ; Jeffers v United States, 187 F. 2d 489, aff'd 342 U.S. 48.

In Jones, supra, the defendant was arrested in an apartment where he was an invitee. Narcotics were found outside the window of the apartment. Jones moved to suppress on the ground that a warrant had been issued without probable cause. The government claimed that Jones had no standing since he alleged neither ownership in the property seized or an interest in the apartment greater than an invitee or guest.

This Court in holding that Jones had standing, said (Jones v United States, 362 U.S. at page 266):

> "We are persuaded however, that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions developed and refined by the common law of evoking the body of private property law which more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical."

In Harlow v United States, 301 F. 2d 361, (1962), at page 372, not 14; the Court commented:

> "We think it clear that appellant Harlow as author of the letters which were seized had a sufficient interest in those letters to enable him to attack the alleged legality of their seizure. (Henzel v U.S. 296 F. 2d 650).

The cases cited by the Court below, namely, Alderman v United States, 394 U.S. 165; Donaldson v United States, 400 U.S. 517; First Nat'l Bank of Mobile v United States, 267 U.S. 576; aff'd 295 F. 142; Wong Sun v United States; 371 U.S. 471, United States v Biegel, 370 F.2d 751; cert. denied 360 U.S. 912, are not dispositive of this issue.

In Alderman v United States, 394 U.S. 165, the petitioners demand retrial if any of the evidence used to convict him was the product of unauthorized surveillance, regardless of whose Fourth Amendment right the surveillance violated. This Court there said, at page 171, 172:

> "This expansive reading of the Fourth Amendment and of the exclusionary rule fashioned to enforce it is admittedly inconsistent with prior cases and we reject it. The established principle is that suppression of the product of a Fourt Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. Co-conspirators and co-defendants have been accorded no special standing".

At bar, it is respectfully submitted the petitioner himself was the victim of the invasion of privacy.

In Donaldson v United States, 400 U.S. 517, the taxpayer was once employed by Acme Operating Company Inc., as a circus performer. An Internal Revenue Agent served separate summonses to Acme and to its accountant to produce certain records of Acme having to do with the taxpayer. This Court permitted such inspection, and said, at page 522, 523:

> "We emphasize initially as did Judge Tuttle in the opinion for the Court of Appeals, 418 F. 2d at 1214 that what is sought here by the Internal

Revenue Service from Merourio and from Acme is the production of their records and not the records of the taxpayer. Further, as Judge Tutle also emphasized, this is not a case where a summons has been issued to the taxpayer itself seeking access to his books and information from his mouth. Neither is it a case where the summons is directed at the taxpayer's records in the hands of his attorney or his accountant with the attendant question of privilege, or even in the hands of anyone with whom the taxpayer has a confidential relationship of any kind."

It is respectfully submitted that at bar, your petitioner had prepared and filed these records with the understanding that these statements "shall be deemed confidential", which of course, distinguishes this case from Donaldson, supra.

The facts in First National Bank of Mobile v United States, 267 U.S. 576, aff'd 295 F. 2d 142 (S.D. Ala., 1924), and Foster v United States, 265 F. 2d 183, cert. denied, 360 U.S. 912, are similiar. In both of these cases served summonses on banks to produce their records relating to the account of the taxpayer. The records were those of the bank, and not that of the taxpayer. Examination of the records were permitted.

In United States v Biegel, 370 F. 2d 751, 756, the Court in holding that appellant had no standing, said:

"In any event, appellants Lapi and Verzino have no standing to obtain suppression of the evidence seized from Beigel. "In order to qualify as a person aggrieved by an unlawful search and seizure (Fed. Rule Crim. P. 41(e), one must have been a victim of a search and seizure, one against whom the search was directed as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search and seizure directed at someone else; Jones v United States, 362 U.S. 257, 261; Wong Sun v United States, 371 U.S. 471. Since neither Lapi nor Verzino was "on the premises" where the search occurred and their convictions did not flow from the possession of either of them of the drugs at the time of the search, they cannot challange the legality of the search. Diaz-Rosendo v United States 2nd Cir., 1966. Moreover, having failed to make any objection below, they may not raise the issue for the first time on appeal. United States v. Herskovitz, 209 F. 2d 881 (2nd Cir., 1954)."

In Wong Sun v United States, 371 U.S. 471, at page 484, this Court said:

"The exclusionary prohibitation extends as well to the indirect as to the direct products of such invasion."

It is respectfully submitted that this Court should grant certiorari to review the holding of the Court below that

petitioner lacks standing under the Fourth Amendment to object to seizure of papers filed with the Judicial Conference of the State of New York, and the Appellate Division of the Supreme Court when the filing was pursuant to the Rules of the Appellate Division of the Supreme Court of the State of New York, and when such filing is deemed confidential.

III

CERTIORARI SHOULD BE GRANTED TO REVIEW THE HOLDING OF THE COURT BELOW THAT PETITIONER'S RIGHTS UNDER THE FIFTH AMENDMENT WERE NOT VIOLATED BY THE INTRODUCTION INTO EVIDENCE OF THE CLOSING STATEMENTS FILED BY THE PETITIONER WITH THE JUDICIAL CONFERENCE.

Shapiro v United States 335 U.S. 1, has been frequently cited for the proposition that private papers may be introduced in evidence, that the production of same does not violate the constitutional rights of the parties. Shapiro, supra, has been cited by the Court below, to sustain its contention that "Records required to be kept pursuant to a reasonable regulatory scheme have 'public aspects' and may be examined for evidence of criminal conduct."

Shapiro, supra, is not applicable in the case at bar, if it is still the law, which is doubtful, in view of subsequent decisions of this Court. (see, Spevak v Klein, 385 U.S. 511; Marchetti v United States, 390 U.S. 39; Gross v United States, 390 U.S. 62.

In Shapiro v United States, 335 U.S. 1, the facts were as follows: The defendant, a wholesale dealer in fruits and produce had been served with a departmental subpoena by the Office and Price Administration directing him to produce sales, invoices, sales books, ledgers, inventory records, etc., At the hearing the presiding officer stated that the defendant was entitled to whatever immunity flows as a matter of law from the production of such records. Said this Court, by a 5-4 vote as follows:

> "the privilege which exists as to to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulations and the enforcement of restrictions validly established."

In Spevak v Klein, 385 U.S. 511, an attorney was disbarred for failure to produce his financial records pursuant to Rule 5 of the Special Rules of the Appellate Division, Second Department (subsequently re-numbered Rule IV(6)). This rule required an attorney to keep all pleadings, records and other papers pertaining to an action, claim and proceedings and all data and memoranda and disposition thereof. Spevak was disbarred by the Appellate Division which was affirmed by the New York Court of Appeals (16 N.Y. 2nd 1048). This Court in reversing the order of disbarment, said at page 512:

> "The self-incrimination clause of the Fifth Amendment which has been absorbed in the Fourteenth, extends

[illegible] protection to lawyers and should not be watered down by imposing the dishonor of disbarment and the deprivation of livelihood as a penalty of assertion it."

and at page 516, this Court said:

"As we recently stated in Miranda v Arizona [384 U.S. 436], "In this Court, the privilege has consistently been accorded a liberal construction." It is in that tradition that we overrule Cohen v Hurley, 366 U.S. 117. We find no room in the privilege against self incrimination for classification of people-now to deny it to some and extend it to others. Lawyers are not exempted from the words. 'No person * * * shall be compelled in any criminal case to be a witness against himself' and can imply no exception. Like the federal teacher in Slochower v Board of Education, 350 U.S. 551, and the policeman in Garrity v New Jersey, [385 U.S. 493], lawyers also enjoy first class citizenship."

In discussing the Spevack case, supra, this Court said at page 517:

"The Spevack case dealt with a federal price control regulation requiring merchants to keep sales records. The Court called them records with "public aspects" as distinguished from private papers. [385 U.S. at 514] and concluded by a divided vote that their production did not violate the Fifth Amendment. We are asked to overrule Spevack, but we find it unnecessary to reach it."

In Marchetti v. United States, 390 U.S. 39, Marchetti was convicted in the District Court on a charge of violating the federal wagering tax statutes (26 U.S.C. Section 4411, 4412), this Court in reversing the conviction said at page 52:

> "Substantial hazards of incrimination as to past or present acts plainly stem from the requirements to register and pay the occupational tax.** In the first place, satisfaction of those requirements increases the likelihood that any past or present gambling offenses will be discovered and successfully prosecuted."

This Court in distinguishing Shapiro supra, said at page 57:

> "There is no need to explore further the elements and limitation of Shapiro and the involving public papers, those points of difference in combination preclude any appropriate application of that case to the present one."

To the same effect, see Gross v. United States, 390 U.S. 62, decided at the same time as Marchetti, supra.

In Gardner v. Broderick, 392 U.S. 273, Gardner was discharged as a patrolman pursuant to section 1123 of the New York City Charter, for his refusal to sign a waiver of immunity before a Grand Jury. This Court in upholding Gardner, said at page 276:

"Our decisions establish beyond dispute the breath of the privilege to refuse to respond to questions when the result may be self-incrimination and the need fully to implement its guaranty. See Spivak v Klein, 385 U.S. 511 (1967), Counselman v Hitchcock 142 U.S. 547, 585-586 (1892), Albertson v Sachs, 382 U.S. 70, 80 (1965). The privilege is applicable to state as well as federal proceedings * * * The question presented in the present case is whether a policeman who refuses to waive the protections which the privilege give may be dismissed from office because of that refusal."

This Court in upholding Gardner, quoted Garrity v New Jersey, 385 U.S. 493 (1967), as follows:

"We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings obtained under threat of removal from office, and it extends to all, whether they are policemen or other members of our body politic."

The other cases cited in the Court below are inapplicable. (Wilson v United States, 221 U.S. 361; Stillman v United States, 177 Fed. 2d 607; and Shushan v United States, 117 F. 2nd 110, cert. den. 313 U.S. 574.

In Wilson v United States, 221 U.S. 361, the plaintiff in error, was held in contempt for refusal to permit the inspection by a grand jury of a letter press copy

book in his possession. The books belonged to a corporation of which he was president and were required to be produced by a subpoena duces tecum. This Court in upholding the subpoena, said at page 380:

> "But the physical custody of incriminating documents does not of itself protect the custodian against their compulsory production. The question still remains with respect to the nature of the documents and the capacity in which they are held."

This, in Wilson, supra, the books were not the property of Wilson, but were the property of the corporation, and Wilson was compelled to produce these records.

In Shillman v United States, 177 F. 2d 607, income tax returns were admitted into evidence, where according to statute and regulations, such returns could be used in any case in which the United States was interested.

In Shushan v United States, 117 F 2d 110, 117, the Court held that the statute requiring a return for taxation of all income, unlawful and lawful is constitutional and that the defendant may at the proper time and on the specific ground assert the right to withhold the particular evidence.

Thus, by reason and authority, the statements of retainers and closing state-

ments are entitled to the protection of the Fifth Amendment, against self-incrimination, as those papers are not "public" as in Shapiro v United States, 335 U.S.1, but are the same type of records as in Spevak v Klein, 385 U.S. 511. These statements when filed with the Judicial Conference are "secret" and "confidential", private and not public.

It is respectfully submitted that this Court should grant certiorair to review the holding of the Court below that petitioner's rights were not violated by introduction into evidence of the closing statements filed by the petitioner with the Judicial Conference of the State of New York.

IV

CERTIORARI SHOULD BE GRANTED TO REVIEW THE HOLDING OF THE COURT BELOW THAT THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN PERMITTING THE JURY IN ITS DELIBERATIONS TO EXAMINE THE SUMMARY SCHEDULES PREPARED BY NUNZIO DONATO, INTERNAL REVENUE AGENT WITHOUT FIRST INSTRUCTING THE JURY THAT THE SUMMARIES WERE NOT PROOF OF ANY FACTS, AND PETITIONER WAS NOT ACCORDED DUE PROCESS:

The Government introduced into evidence the testimony of Nunzion Donato, a

field group supervisor of the Internal Revenue Service, who testified that he had heard most of the testimony in this case, and that he had examined all the documents and exhibits which were in evidence, and that as a result he prepared certain schedules, in his own handwriting.

The verdict of the jury, was the result of the jury comparing petitioner's tax returns and the summary schedules prepared by Nunzio Donato, the Government Revenue Agent, and not upon the primary evidence.

It is respectfully submitted that when the Trial Court permitted these exhibits to be examined by the jury in its deliberations, the Court erred in not cautioning the jury that these summaries had no independent value, and that they could chose to disregard it as evidence, if they did not accept the correctness of any document, upon which those summaries were prepared, and they they must likewise disregardso much of the summary as was based upon the testimony of such witnesses and such documents as the jury decided to disregard.

At the time of the jury's deliberations, and when the jury requested these exhibits, the Court merely said:

> I take it that refers to the schedules I told you you could consider as a

memorandum but which are not basic evidence, the basic evidence being the documents which are in evidence. But, I will sent in these exhibits to you."

It is respectfully submitted that in permitting these summary sheets to be examined by the jury at the time of its deliberations, the Court should have followed the guide lines for the introduction of such evidence as set forth in United States v Bernard, 287 F. 2d 715, and should have instructed the jury that these exhibits were entitled to weight as evidence only to such an extent as the jury could find that the primary testimony of other witnesses and the exhibits upon which those summaries were based were entitled to weight and credibility, and that if they did not accept the correctness of any document, then they must likewise disregard so much of the summary as is based upon such witnesses and documents.

In United States v Barnard, 287 F. 2d 715, page 722, the Court in discussing the admissibility of summaries made by an agent of the Internal Revenue said:

"With respect to the testimony of Ruggabar (Internal Revenue Agent), the Court instructed the jury that his testimony was entitled to weight as evidence only to such an extent as the jury could find that the pri-

mary testimony of other witnesses and the exhibits upon which his expert testimony was based was entitled to weight and credibility. With respect to the Ruggabar summaries, the Court stated in its charge to the jury;"

"Such exhibit has no independent value. If you choose to disregard as evidence all or a part of the testimony of any witness in this case or do not accept the correctness of any document admitted into evidence than you must likewise disregard so much of the summary as is based upon the testimony of such witnesses and such documents you decide to disregard."

Those instructions meet all the requirements for the use of such evidence as set forth in the cases.

Comparing the charge to the jury in Bernard, supra, and the comment of the Court when these charts were handed to the jury for its deliberation, where the Court characterized the testimony of Mr. Donato as "evidence", the prejudice to the defendant becomes apparent.

To the same effect, see:

United States v Johnson, 319 U.S. 503

Somberg v United States, 71 F. 2d 637 (7th Cir.)

Smith v United States, 239 F. 2d 168, cert. denied, 353 U.S. 983

Isabell v United States, 236 F. 2d 557, cert. den. 352 U.S. 990

Blackwell v United States, 244 F. 2d 472, cert. den. 355 U.S. 838

United States v Tolbert, 406 F. 2d 81

The prejudice to the defendant is apparent from the statement made by Mrs. Karman, the foreman of the jury to the Court, held on March 11, 1971, when she said:

"In addition to the that little note I had also requested some of the material that some of the jurors wanted to go through. There was apparently some interest that they had in certain expenses or income that they wanted to look at, and they took time and reviewed those sheets."

United States v Kelley, 105 F. 2d 912, 913 (2nd Cir., 1939) Cited by the Court below is not the contrary. All it holds are that these records are admissable.

It is respectfully submitted that the action of the trial Court in not following the guide lines as to the admissibility of this evidence, highly prejudiced the petitioner and prevented him from receiving a fair trial.

It is respectfully submitted that this court should grant certiorari to review the holding of the court below that the trial court did not commit reversible error in permitting the jury in its deliberations to examine the summary schedules prepared by Nunzio Donato, Internal Revenue Agent, without first instructing the jury that the summaries were not proof of any fact, and in characterizing these summaries as "evidence".

V

CERTIORARI SHOULD BE GRANTED TO REVIEW THE HOLDING OF THE COURT BELOW THAT A FATAL VARIANCE BETWEEN THE INDICTMENT AND THE BILL OF PARTICULARS DOES NOT WARRANT REVERSAL WHEN IN THE OPINION OF THE COURT BELOW PETITIONER WAS NOT PREJUDICED BY SURPRISE OR WAS HINDERED IN HIS PREPARATION FOR TRIAL:

The government conceded and the Court below found that the original bill of particulars listed as gross income for the tax years involved the same figures which the indictment listed as taxable income.

The government, as well as the Court below, asserted that the Government supplied the petitioner with details and correct schedules after having served the bill

of particulars months before the trial.

The record on appeal belies this assertion by the Government. Petitioner concedes that there was turned over to his attorney, certain schedules, which schedules are not a part of the bill of particulars. The United States Attorney told the Court, "I have a covering letter in my file". The contents of this letter was never exhibited to the attorney for the defendant.

The function of a bill of particulars was well stated in United States v Murray, 207 F. 2d 812 (2nd Cir., 1962), at page 818:

> "The function of a bill of particulars is to enable the accussed to prepare for trial and to prevent surprise and to this end the government is strictly limited to proving what it has set forth. United States v Neff, 212 F. 2d 297."

See to the same effect:

United States v Slaughter, 89 F. Supp. 205.

Bryan v United States, 175 F. 2d 223

Rabinowitz v Borish, 43 F. Supp. 413

United States v Glasser, 116 F. Supp 690.

United States v Glaze, 313 F. 2d 757

It is of course, elementary, that any information supplied by the Government, not in the Bill of Particulars does not limit the government on its proof.

When petitioner's attorney made a motion to dismiss the indictment by reason of the variance between the bill of particulars and the indictment, the trial Court denied the motion, and directed the Government to file an amended bill of particulars.

In United States v Neff, 212 F. 2d 297, the trial Court, as the trial Court in the case at bar, permitted the Government to file a supplemental bill of particulars the day after the trial, said the Court in reversing the conviction, at page 310:

> "We regret that we cannot be as gracious as was the trial judge; to do so would be in violation of well settled principles designed to preserve the rights of the accused persons."

The trial Court should have been vigilant to preserve the rights of the petitioner either by declaring a mistrial of granting the motion to dismiss. The trial Court did neither, but directed the Government to file an amended bill of particulars while

the trial was in progress. In doing so, the petitioner was highly prejudiced, and it is respectfully submitted that this Court should grant certiorari to review the holding of the Court below that the fatal variance between the indictment and the bill of particulars did not warrant reversal when in the opinion of the Court below petitioner was not prejudiced by surprise or was hindered in his preparation for trial.

VI.

CERTIORARI SHOULD BE GRANTED TO REVIEW THE HOLDING OF THE COURT BELOW THAT THE FIRST COUNT OF THE INDICTMENT WAS NOT BARRED BY THE STATUTE OF LIMITATIONS.

Count one of the indictment charged petitioner with attempting to evade a large part of his income tax due and owing to the United States of America, for the calendar year 1961, and by filing and causing to be filed with the District Director of Internal Revenue a false and fraudulent income tax on or about April 15, 1962.

The Subject indictment was filed on April 10, 1968, but the tax return which was the subject of the indictment, was filed with the District Director of Internal Revenue, Manhattan District, New York, New York, on or about March 19, 1962. Accordingly, more than six years had elapsed

between the filing of the 1961 income tax return by the petitioner, and the filing of the indictment on April 10, 1968.

The Statute of Limitations having run as to the indictment count relating to the 1961 income tax year, said count should have been dismissed.

The Court below, in holding that the Statute of Limitations did not apply, said "although since he (petitioner) received concurrent sentences, the success of this contention would have little practical effect.

This Court in United States v Habig, 390 U.S. 222, held that the offense of attempting to evade income taxes by filing a false return is committed at the time the return is filed.

VII

CERTIORARI SHOULD BE GRANTED TO REVIEW THE HOLDING OF THE COURT BELOW THAT THE GOVERNMENT MADE OUT A PRIMA FACIA CASE, AND WAS THE COURT BELOW IN ERROR IN REFUSING TO DISMISS THE INDICTMENT

The elements necessary for the Government in order to secure a conviction under Title 26, Section 7201 United States Code, are set forth by this Court in Sensone v United States, 380 U.S. 343, at page 351:

"As has been held by this Court, the elements of Section 7201 are wilfulness; the existence of a tax deficiency; Lawn v United States, 355, U.S. 339; 361; Spies v United States, 317 U.S. 492, at 496; and an affirmative act constituting an envasion or attempted evasion of the tax. Spies v United States, supra.

This Court in Spies v United States, 317 U.S. 492; illustrating what may be willful, said at page 499:

"By was of illustration, and not by way of limitation, we would think affirmative wilful attempt may be inferred from conduct such as keeping a double set of books, making false entries, or alterations, or false invoices, or documents, destruction of books, or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind and any conduct, the likely effect of which would be to mislead or to conceal."

The trial Court in its charge to the jury, did not define the terms "wilful" as it was defined by this Court.

The second element which the Government must prove for a conviction in this type of case, is the existence of a tax

deficiency, and before a jury can determine whether an income tax is due and owing, there must be evidence of an understatement of tax, and a prequisite to the imposition of tax is the establishment of taxable income. United States v Gross, 286 F. 2d 59 (2nd Cir), Small v United States 255 F. 2d 604 (CA 1st, 1961).

It is respectfully submitted that the Government never proved the existence of a tax deficiency.

The Government attempted to prove income, expenses and deductions for the tax years 1961 through 1965 and the tax allegedly due by the testimony of Nunzio Donato, the Internal Revenue Agent, who testified that he had prepared summary sheets of income, expenses and taxes for the years 1961 through 1965, but when that exhibit was offered in evidence, the trial Court sustained the objection of petitioner's attorney, and said exhibit was never offered in evidence.

Thus, even on the Government's case, the record is barren as to the taxable income of petitioner. The admission into evidence of the other numerous exhibits, does not of course, show, taxable income, which is the only income on which a tax is due. A conviction cannot stand, absent proof of deficiency.

In Lawn v United States, 355 U.S. 339, at page 361, this Court said:

"While, of course, a conviction upon a charge of attempting to evade assessment of income taxes by filing a fraudulent return cannot stand in the absence of proof of deficiency."

It is of course, elementary, that before a case can go to the jury, there must be some evidence, from which a jury could determine taxable income, and then determine whether, a substantial amount of the tax was evaded. In the absence of such proof, the trial Court should have dismissed the indictment.

Thus, in a criminal case, under a Statute which requires proof beyond a reasonable doubt that taxable income was wilfully omitted from the tax return for the taxable years in question, the Government made no proof of the essential elements. At most, the Government was able to show, by their many witnesses and exhibits offered in evidence, was that petitioner received and paid out checks, which, of course, is a far cry from taxable income.

The record is barren, as to the amount of tax allegedly due from petitioner, and in that state of the record, how the jury arrived at the conclusion, that a substantial amount of the tax was not paid is a mystery, which can only be explained by the fact, that Mr. Donato's sheets were examined, and compared to the tax returns of the petitioner.

As to the third element necessary to conviction, which is an affirmation act consisting of an evasion or attempted evasion (Spies v United States, 317 U.S. 492), the trial Court charged that mere knowledge on the part of petitioner that he knew he had taxable income for the years in question is sufficient. It is respectfully submitted that this charge was error. In Spies v United States, 317 U.S. 492, 498, this Court said:

> "But in view of our traditional aversion to imprisonment for debt we would not without the clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax, where there had been no wilful failure to disclose the liability, is intended to constitute a criminal offense to any degree. We would expect willfullness in such cases to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer."

It is respectfully submitted that the Government failed to make out a prima facia case, and the indictment should have been dismissed.

The Court below, in affirming this conviction merely states: "Appellant's

final contention is that the Government failed to make out a prima facia case".

It is respectfully submitted that this Court should grant certiorari to review the holding of the Court below that the Government made out a prima facia case, and to determine whether the Court below was in error in refusing to dismiss the indictment.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certorari be granted to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

Attorney for Petitioner
Pro Se
Office & P.O. Address
258 Broadway
New York, New York
(212) 267-2760

APPENDIX I

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 74 September Term 1971

Argued
September 15, 1971

Decided
October 26, 1971

Docket No. 71-1472

United States of America

Appellee,

v

Frank L. Silverman,

Appellant.

Before:

MOORE, SMITH and HAYES,

Circuit Judges

Appeal from a judgment of the United States District Court for the Southern District of New York, Edward C. McLean, Judge, convicting appellant, after a jury trial, of five counts of attempted income tax evasion in violation of 26 U.S.C. Section 7201 (1970)

Affirmed

AMES T. B. TRIPP, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, Rudolph W. Guiliani, Assistant United States Attorney, on the brief), for Appellee.

RANK J. SILVERMAN, New York, N.Y., pro se for Appellant.

AYS, Circuit Judge:

This is an appeal from a judgment of onviction on five counts of attempted income tax evasion (26 U.S.C. 7201(1970), entered in the United States District Court, or the Southern District of New York after jury trial. Appellant was sentenced to ne year imprisonment on each count, the entences to run concurrently. We affirm he judgment of the district court.

The Government's proof at the trial howed that appellant's tax returns for he calendar years 1961-1965 substantially understated his taxable income. Silverman is an attorney whose income consisted rincipally of fees for representing personal injury claimants, commissions received as an insurance broker, wages for acting as a claims referee for the New York orkmen's Compensation Board, dividends rom corporate stocks, interest on twenty-hree savings accounts and capital gains rom transactions in securities.

Appellant's first assignment of error is that his conviction was invalid because one of the jurors on the panel which convicted him, a Mrs. Allman, could not read or write English. This fact was first discovered on the day the jury rendered its verdict, when the forelady sent a note to the trial judge that read: "We have a juror who cannot write English. What do we do re her decision?" The judge suggested that Mrs. Allman be permitted to cast her vote orally. The jury thereupon returned to the verdict convicting appellant. Six days later defendant moved to dismiss the indictment or for a new trial on the ground that Mrs. Allman was not qualified to serve as a juror. After a hearing at which it was established that Mrs. Allman had no difficulty in speaking and understanding English and that she could read numbers, the judge denied the motion.

Section 1865 of Title 28 U.S.C. (1970) provides in relevant part:

> (b)...The chief judge of the district court shall deem any person qualified to serve on grant(sic) and petit juries in the district court unless he---
>
> (2) is unable to read, write and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualifi-

cation form...

As the hearing revealed, Mrs. Altman had her lawyer fill out the juror qualification form and had in fact answered "No" to the question "Can you read, write, Speak and understand the English language?" She had nevertheless been called to serve, and her inability to read and write English remained unknown to all connected with the trial until the day of the verdict.

Section 1867 of Title 28 provides:

(a) In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered by the exercise of diligence the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

(c) The procedures prescribed by this section shall be the exclusive means by which a person accused of a Federal crime... may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title. (Emphasis added).

We may assume that there was a "substantial failure to comply with the" statute in this case. However, the statute clearly re-

cation only, such disqualification is ordinarily waived by failure to assert it until after verdict, even though the facts which constitute the disqualification were not previously known to the defendants."

We would not hesitate to find prejudice requiring reversal where the claimed disqualification might have adversely affected the challenged juror's ability to decide a case intelligently. For example if in the present case Mrs. Altman had been unable to understand English, clearly the verdict could not stand. Appellant urges that Mrs. Altman's inability to read falls within the area covered by the rule we have just stated, since many schedules, data, summaries, cancelled checks, and tax returns were shown to the jury. These exhibits were pertinent only for the numbers that appeared on them, however, and Mrs. Altman testified at the hearing on defendant's motion that she could read numbers. Moreover the Government's evidence that appellant's tax returns contained substantial understatements of income was virtually uncontested. The defense was largely based on absence of willfulness. It was claimed that he delegated the handling of his tax matters to his wife. None of the documentary evidence was relevant to this aspect of the case. Mrs. Altman could weigh and consider this evidence quite as well as any other juror. The record shows that she had no difficulty at all in understanding the oral testimony. We conclude that defendant was not prejudiced by reason of Mrs. Altman's inability to read and write English.

Appellant's failure to make prompt objection when the facts of Mrs. Altman's situation came to light detracts further from the force of his case since it was still possible, even at that late date, for the judge to take measures to make certain that Mrs. Altman understood all the evidence such as having read to her any exhibits claimed by defendant to of critical importance. Also at this point the judge could perhaps have persuaded the parties to accept a verdict of eleven jurors. See United States v Indiviglio, 352 F 2d 276 (2d Cir., 1965) (en banc), cert dismissed 383 U.S. 907 (1966).

II.

Appellant objects to the admission against him of evidence resulting from the inspection by the agents of the Internal Revenue Service of closing statements filed with the Appellate Division of the New York Supreme Court, First Department, and with the Judicial Conference of the State of New York. Attorney's in contigent fee cases are required by court rule to file these statements. McKinney's New York Court Rules Sec. 603.4 (b) (1970), and the penalty for failure to file is disbarment. Id. Sec. 603.2; N.Y. Judiciary Law Sec. 90(2)(McKinney, 1968). The required statements show, inter alia, the amount of compensation received by the attorney. In Silverman's case, his statements were used by the Government to aid in establishing his gross in-

come. The IRS obtained access to the statements by order of the Presiding Justice of the Appellate Division, First Department, pursuant to McKinney's New York Court Rules Sec. 603.4(c)(1)(1970), which provides:

"All statements of retainer or closing statements filed shall be deemed to be confidential and the information therein contained shall not divulge or made available for inspection or examination except upon written order of the Presiding Justice of the Appellate Divisbn."

Appellant argues that the Government's use of these statements violated his fourth amendment right to be free from unreasonable searches and seizures, and his fifth amendment right against self-incrimination. Appellant moved before trial to suppress the statements and all evidence derived from them; this motion was denied by then District Judge Mansfield. United States v. Silverman, 311 F. Supp. 485 (S.D.N.Y., 1970).

Appellant lacks standing under the fourth amendment to object to the seizure of papers filed with and in the possession of the Appellate Division and the Judicial Conference.

"The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence."

the filing of the tax returns that failed to report certain income.

III

Appellant urges that reversal is required here because of a variance between the indictment and a bill of particulars supplied by the Government. Certain figures correctly labled "taxable income" in the indictment were incorrectly labled "gross income" in the bill of particulars. The real issue is whether there was a fatal variance between the bill of particulars and the proof; since the indictment was correct and since appellant does not claim that the proof and the indictment vary, there is no question of an improper amendment of the indictment. The discrepancy between the bill of particulars and the proof is reversible only if appellant was prejudiced by surprise or was hindred inhis preparation for trial. See, e.g. United States v Glaze, 313 F. 2d 75 (2d Cir., 1963). Since the indictment contained the correct figures, appellant had more than ample notice of what the Government intended to prove. Furthermore, the Government supplied defendant with detailed and correct schedules after having served the bill of particulars and months before the trial. In the circumstances the obvious error in the bill of particulars can hardly have hindered appellant in preparing his case.

Sec. 6072(a)(1970) and an indictment filed on April 10, 1968 was timely. United States v Habig 390 U.S. 222 (1968), cited by appellant holds only that where a taxpayer files a return after the due date, the limitations period begins when the return is actually filed. The rule is inapplicable here.

Appellant contends that the trial court committed such "plain error" in charging the jury on the elements of the crime that we should reverse despite appellant's failure to object at the time (see F.R. Crim. Proc. 52(b)). Our consideration of the charge reveals no such error.

Appellant's final contention is that the Government failed to make out a prima facia case. The record presents ample proof of appellant's guilt.

Affirmed.

HANOFIELD, D.J.,

Defendant, a member of the New York bar, is charged with filing false and fraudulent income tax returns for the years 1961 through 1965, in violation of 26 U.S.C. §7201. Claiming that the indictment under which he is charged is based upon information procured in violation of his Fourth and Fifth Amendment rights, he moves for an order suppressing all evidence derived from the inspection of certain documents filed by him in accordance with rules of the Appellate Division, First Department, of the State of New York (Part 4; Rule 603). He also seeks a bill of particulars and discovery and inspection of his tax returns and certain statements made by him.

In the tax years in question defendant maintained a law office in New York County from which he carried on a [illegible] consisting chiefly of the handling of personal injury claims and actions. In those cases handled on a contingent fee basis he was required by the rules of the Appellate Division, First Department, to file both a brief statement setting forth, inter alia, the gross amount of the recovery, the insurance carrier from which the amount was paid, the amount received by the client, expenses and disbursements incurred by the attorney in the client's behalf, and the amount claimed by the attorney as his fee. [illegible] originally required to be filed with the Appellate Division [illegible] with the Supreme Court of New York, [illegible]

under the names of Irwin B. Silverman and Silverman & Silverman during the years 1960 through 1965.

Defendant claims that the present indictment is predicated in large part, if not in its entirety, upon information derived from the closing statements examined by Agent Juliano. He argues in support of his motion to suppress that the 1961 grant of blanket permission for such examination, as well as the manner of granting specific permission in this case, constituted an improper search under the Fourth Amendment, and that the obtaining of the records themselves constitutes an infringement of his Fourth and Fifth Amendment rights and violates his privilege against self-incrimination.

Defendant's Fourth Amendment objection to examination of the closing statements must be rejected for lack of standing. We find no merit in his unsupported contention that the Appellate Division and the Judicial Conference are "mere custodians" of such statements and that the statements belong to the lawyers who file them. Defendant has no possessory interest in the records filed with the Appellate Division and the Judicial Conference. Once filed, they become the property of the Judicial Conference. See United States v. Shapiro, 335 U.S. 1 (1948). Defendant was neither on nor had any interest in the premises of the Judicial Conference at 270 Broadway, New York City, where the statements were examined, and he is not charged with a crime involving possession of the statements he desires to suppress. Hence, he is without stand-

he understated his income the closing statements, of course, may have become useful to the Government as a source of incriminating information. But they were no more incriminating than a report of any lawful business activity as a source of unreported income, and their use did not violate defendant's privilege against self-incrimination.

Thus the mere fact that defendant was compelled to file the closing statements is not a sufficient ground for invocation of the Fifth Amendment privileges against self-incrimination. The test is whether there was a substantial risk of incrimination involved in making the required disclosures. Closing statements do not pose such a risk. They are no different than tax returns filed under threat of criminal penalties, which are admissible against the taxpayer in subsequent tax prosecutions, absent the kind of substantial dangers of self-incrimination present in Marchetti and Grosso.

For all of these reasons defendant's motion to suppress must be denied.

Defendant also moves for a bill of particulars as to a number of items in the indictment. First he requests that the Government specify the amount of gross income allegedly received by him during each of the tax years in which he is charged with understating his income. The Government has consented to furnish such information.

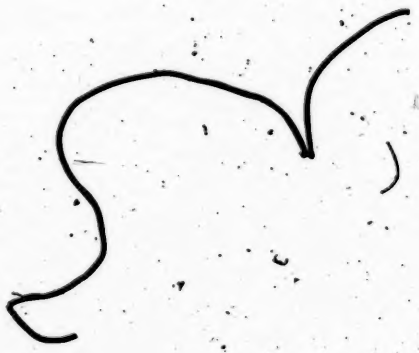
Second, defendant requests a complete itemization, by category and source, of the gross income figures supplied pursuant

his first request. The Government continues to furnish:

"The amount of dividend, local-professional, capital gains, and interest income received by the defendant during each of the years in question. The Government, however, opposes furnishing a complete itemization as requested by the defendant at this time on the ground that such a request unnecessarily delves into the evidentiary details of the Government's case, would unnecessarily restrict the Government's proof and would impose a needless burden on the Government."

In light of the Government's further consent to furnish a complete itemization [illegible] before trial of the case, defendant's request is denied except as consented to. The Government's compliance will be more than adequate to obviate any problems of surprise at trial and to enable defendant properly to prepare his defense, while the complete itemization two weeks before trial will be doubly certain that defendant is not a victim of any prejudicial surprise at trial. See United States v Lehmen, 222 F.2d 62 (2d Cir.), cert. denied, 350 U.S. 836 (1955); United States v Hahauer, 203 F. Supp. 450 (S.D.N.Y., 1962); United States v [illegible], 272 F. Supp. 450 (S.D.N.Y., 1967).

Third, defendant requests that the Government state whether each item of [illegible] income sought in his second request was reported in his returns, and also, the amounts reported. As indicated below, the Government has consented.



to furnish defendant with copies of his returns for the years 1961-1965. In conjunction with the information to be supplied pursuant to defendant's second request, these will enable him to calculate for himself as much of the requested figures as is necessary.

Fourth, defendant requests that with respect to each count the Government state in detail, how the amount of taxable income alleged in each was arrived at. The Government has already consented, in response to the second request, to supply breakdown figures of the defendant's alleged taxable income for the relevant years. It resists, quite properly, furnishing any further details of the precise manner in which these figures were arrived at. Such details would come very close to granting defendant inspection of the Government's file in the case, and would go beyond legitimate particularization to discovery of the Government's evidence.

Finally, defendant requests that with respect to each count, if the amount of personal or business deductions alleged in arriving at the figures alleged in the indictment differs in any respect from that claimed by defendant on the returns filed by him, the Government set forth such difference, showing the deductions claimed and allowed and stating the reasons for the difference. Since the information which the Government has furnished and agreed to furnish in response to this request is more than adequate to enable defendant to prepare for trial, the request is denied to the extent consented to.

No. 71-695

In the Supreme Court of the United States

OCTOBER TERM, 1971

FRANK L. SILVERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

SCOTT P. CRAMPTON,
Assistant Attorney General,

JOHN P. BURKE,
RICHARD B. BUHRMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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FRANK L. SILVERMAN, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 56-67) is reported at 449 F.2d 1341. The opinion of the district court denying the motion to suppress evidence (Pet. App. 68-78) is reported at 311 F. Supp. 485.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1971, and the petition for a writ of certiorari was filed November 23, 1971. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, there was reversible error because one of the jurors could not read or write English.

2. Whether the admission of evidence resulting from the inspection of certain closing statements filed with state judicial authorities violated the Fourth or Fifth Amendments.

3. Whether the jury was permitted to examine summary charts prepared and introduced into evidence by the government without proper instructions as to their use.

4. Whether there was a fatal variance between the indictment and the bill of particulars supplied by the government.

5. Whether one count of the five-count indictment was barred by limitations.

6. Whether the evidence was sufficient to support the verdict.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The relevant constitutional provisions, statutes and rules involved are set forth at Pet. 4-10.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on five counts of willfully at-

tempting to evade income taxes for the years 1961 through 1965, in violation of Section 7201 of the Internal Revenue Code of 1954, and was sentenced to concurrent one-year sentences on each count. The court of appeals affirmed (Pet. App. 56-67).

The material facts are largely undisputed, and are set forth fully in the opinion of the court below. During the relevant years, petitioner was engaged in the practice of law. The proof established that, in each of the five years involved, petitioner either totally excluded from his tax return, or understated, his professional income, capital gains, interest, dividends and commissions. The disparities between petitioner's reported and true taxable income for each year were summarized as follows (Govt. Ex. 222):

Year	Reported Taxable Income	Actual Taxable Income	Unreported Taxable Income
1961	$ 4,324.47	$ 26,798.15	$22,473.68
1962	5,947.27	18,022.90	12,075.63
1963	8,872.55	18,714.62	9,842.07
1964	10,739.27	16,554.87	5,815.60
1965	10,593.28	31,779.32	21,186.04
TOTALS	$40,476.84	$111,869.86	$71,393.02

The government's proof was based in part on an examination of certain "closing statements" that petitioner filed in contingent fee cases with state judicial authorities pursuant to court rule, disclosing the compensation received by him. These statements are confidential, but may be made available for inspection by court order. Such an order was obtained by the Internal Revenue Service here. Petitioner's pre-trial motion to suppress the evidence thus obtained, on

grounds that its use would violate the Fourth Amendment and the privilege against self-incrimination under the Fifth Amendment, was denied in a comprehensive opinion by the trial judge (Pet. App. 68-78; 311 F.Supp. 485).

On the day the jury rendered its verdict, the forelady advised the trial judge that one of the jurors, a Mrs. Altman, could not write English, and asked how Mrs. Altman should render her verdict. The trial judge suggested that she do so orally, and the guilty verdict followed. No objection was filed then, but six days later petitioner moved to dismiss the indictment or for a new trial because Mrs. Altman was not qualified to serve as a juror. At the ensuing hearing, it was discovered that Mrs. Altman's juror qualification form, which she had completed with her attorney's assistance, indicated that she could not read or write English, though this information was not discovered until after trial. It was established that Mrs. Altman had no difficulty in speaking and understanding English and could read numbers, as the trial judge had determined after a personal examination of each juror (214A-215A).[1] The trial judge accordingly denied petitioner's motion.

ARGUMENT

1. The courts below correctly held that there is no substance to petitioner's "basic" contention, that his conviction was invalid because Mrs. Altman could not read or write English (Pet. 18-28).

---

[1] References to page numbers followed by the letter "A" are to the appendix in the court below.

While Mrs. Altman stated this fact in her juror qualification form, she nevertheless was called to serve and her inability to read and write English was not known until the day of the verdict. When this fact was brought out, no objection was made until six days after the verdict. In this circumstance, even if Mrs. Altman did not satisfy the statutory qualifications under 28 U.S.C. 1865, as petitioner contends, his conviction is not invalid on that ground alone. For as the court below noted (Pet. App. 58-60), the applicable statutory procedure (28 U.S.C. 1867) "clearly requires that a challenge on this ground be made at or before the voir dire" (Pet. App. 59).

Nor is there any other reason to invalidate petitioner's conviction on this account, since the inclusion of Mrs. Altman on the jury was not prejudicial to him. See *Jackson* v. *United States*, 408 F. 2d 306, 309 (C.A. 9); *Ford* v. *United States*, 201 F. 2d 300, 301 (C.A. 5); *United States* v. *Rosenstein*, 34 F. 2d 630, 634 (C.A. 2). Petitioner did not dispute the fact that his tax returns substantially understated his taxable income. His defense was that he had delegated the handling of his tax matters to his wife, and that as a result the requisite "willfulness" was not present. But as the court below pointed out, Mrs. Altman, who had lived in the United States for 44 years, had "no difficulty at all in understanding the oral testimony," and "could weigh and consider this evidence [relating to willfulness] quite as well as any other juror" (Pet. App. 61). These facts provided ample basis for the court's conclusion that petitioner "was not prejudiced by reason of Mrs. Altman's inability to read and write English" (*ibid.*).

2. The introduction into evidence of the closing statements indicating petitioner's compensation from contingent fees did not violate his Fourth and Fifth Amendment rights.

The examination and copying of the statements by Internal Revenue Service agents did not violate petitioner's Fourth Amendment rights, since the statements neither belonged to him nor were in his possession at the time. Thus, the courts below correctly held that petitioner could not object on Fourth Amendment grounds. See *Alderman* v. *United States*, 394 U.S. 165, 171-172.

Similarly, there was no deprivation of petitioner's privilege against self-incrimination under the Fifth Amendment. The filing of the statements, though compulsory, had no relevance to petitioner's criminal conduct; on this basis, the courts below properly found that *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, were "completely inapposite" (Pet. App. 64; see *id.* at 72-75). In these circumstances, it is clear that petitioner was not compelled to incriminate himself. Moreover, the closing statements were "required to be kept pursuant to a reasonable regulatory scheme [and thus] have 'public aspects' and may be examined for evidence of criminal conduct" (Pet. App. 64). *Shapiro* v. *United States*, 335 U.S. 1, 32-35; see also *California* v. *Byers*, 402 U.S. 424.[2]

---

[2] Cf. *Hill* v. *Philpott*, 445 F. 2d 144 (C.A. 7), certiorari denied, No. 71-442, December 14, 1971, where the matters seized, unlike the statements here, were the personal records of the person from whom they were seized.

3. There is no substance to petitioner's claim (Pet. 41-46), which in any event he failed to raise at trial, that the trial judge erred in permitting the jury to examine the government's summary charts of alleged unreported income and tax deficiencies. It is well settled that such charts and summaries are admissible evidence in income tax evasion cases like this. See *United States* v. *Johnson*, 319 U.S. 503, 519-520. The record belies the contention that the summaries were given to the jury without proper instructions as to their use; such instructions were given twice, when the summaries were offered and again when the jury asked for them during its deliberations (see Pet. App. 66; 214A).

4. There was no significant variance between the government's bill of particulars and the indictment, contrary to petitioner's assertion (Pet. 46-49). The original bill of particulars incorrectly listed as gross income for each taxable year the same figures which the indictment correctly listed as taxable income. But the government subsequently furnished petitioner "with detailed and correct schedules after having served the [original] bill of particulars and months before the trial" (Pet. App. 65), and thus, as the court below held, the error in the original bill was not prejudicial. See *United States* v. *Glaze*, 313 F. 2d 757 (C.A. 2).

5. Count I of the indictment was not, as petitioner contends (Pet. 49-50), barred by limitations. As the court of appeals ruled, the indictment was filed within the period specified by the applicable statute (Pet. App. 66-67). The case on which petitioner relies

(*United States* v. *Habig*, 390 U.S. 222) is not controlling here; unlike the returns in *Habig*, which were filed after the normal filing date, the return in question here was filed before the due date and thus the pertinent time period is that specified in the statute.

6. Petitioner's final argument that the government failed to make out a prima facie case (Pet. 50-55) is, as the court below held, insupportable, since "[t]he record presents ample proof" of petitioner's guilt (Pet. App. 67). The government established substantial understatements of taxable income for each year, totalling $71,393.02. The jury could properly infer that this was willfully done from petitioner's consistent pattern of understating large amounts of income and failing to state all his income on his books and records. Compare *Holland* v. *United States*, 348 U.S. 121, 139.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

JOHN P. BURKE,
RICHARD B. BUHRMAN,
Attorneys.

JANUARY 1972.

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